

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
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Federal Communications Commission
Office of Secretary

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations
(Cambridge and St. Michaels, Maryland)

)
)
)
) MM Docket No. 04-20
) RM-10842
)

To: The Secretary

REPLY TO RESPONSE TO REPLY COMMENTS

CWA Broadcasting, Inc. ("CWA"), the licensee of Station WINX-FM, Cambridge, Maryland (the "Station" or "WINX"), by its attorneys, hereby replies to the Response to Reply Comments ("Response"), submitted by MTS Broadcasting, L.C. ("MTS") on January 21, 2005. In support thereof, CWA states as follows.

A. PRELIMINARY STATEMENT

On December 27, 2004, CWA submitted its Reply Comments in the instant proceeding, pursuant to the *Public Notice*, Report No. 2685, released December 9, 2004. Now, nearly a month after the Reply Comments were submitted, MTS has submitted an unauthorized Response to Reply Comments of CWA Broadcasting, Inc.¹ CWA will show herein that MTS has failed to establish any basis for the Commission to deny CWA's requested change in the FM Table of Allotments.

¹ Simultaneously herewith, CWA is submitting an Opposition to MTS's Motion for Leave to File Response to Reply Comments of CWA Broadcasting, Inc.

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Initially, CWA is surprised that MTS is now objecting to CWA's proposed resolution of the allotment issues in this proceeding. MTS had filed its Counterproposal in order to secure a new Class A allotment on Channel 233 at Newark, Maryland. In its Reply Comments, CWA advised the Commission that the Commission could make the change requested by CWA while also allotting Channel 235A to Newark, thereby giving MTS what it sought. Such a result is consistent with the "logical outgrowth" policy adopted in rulemaking proceedings where the Commission, once a proceeding is initiated, is entitled to allot channels to meet the Section 307(b) requirements of a "fair, efficient, and equitable distribution of radio service." *Pinewood, South Carolina*, 68 RR 2d 1124 (1990).

Considering that CWA's allotment proposal would provide MTS exactly what it sought, CWA cannot believe that MTS is expending time and money in continuing to attack CWA's allotment request and the proposed result that would benefit it. CWA can only conclude that MTS's motivation here is not to secure a new FM allotment for Newark but to prevent CWA from obtaining a change in its own allotment. That is an unacceptable result.

B. CWA IS ENTITLED TO A SECOND ALLOTMENT PRIORITY

Turning to the merits of MTS's pleading, MTS's principal argument is that CWA is not entitled to a second allotment priority that would result in CWA's allotment proposal being preferred to MTS's Counterproposal. In this regard, MTS argues that the Commission should not rely on coverage calculations based on service from the allotment reference point and that the impact on service to St. Michaels, Maryland must be considered. These claims are wide of the mark.

The use of coverage calculations based on the allotment reference point is, as MTS is forced to admit, the standard practice of the Commission. *See Edenton, Columbia and Pine Knoll*

Shores, North Carolina ("Edenton"), 11 FCC Rcd 7531, 7533-7534 (MMB 1996). This is the rule that has been applied to all parties who have come before the Commission to date. CWA seeks to abandon this in favor of what it deems a "reality" based analysis.

This is not the forum where policy changes are to be proposed or made. If MTS feels that a different form of analysis needs to be applied, it can certainly petition for a rule making to be initiated on the subject of how coverage is to be determined. However, it has never been the Commission's policy to look at what facilities are actually built in order to handle allotments questions. Such a result is neither realistic nor practical.

The allotments policy has always been based on theoretical constructs. These deal with the communities themselves and the services that are to be provided. The Commission has never demanded that parties carry through on the construction of maximized facilities. This is not realistic since it may not be possible for permittees to do that. But, what is critical is that allotments provide the ability for that to occur now or in the future.² No more is required and MTS is not entitled to demand it, just as nothing in the way of how realistic MTS's proposal to serve the 339 people in the Newark CDP is or might be.

² In the *Edenton, supra*, proceeding the reasoning on this point was (*Id.* at 7533):

At the rule making stage, we presume that all channels will be applied for at transmitter sites which are fully spaced to all other stations and allotments. In addition, while they may intend to utilize their present transmitter site by applying for the channel under the provisions of Section 73.215 of the Rules, there is no way of determining, with certainty, that their present intention will prevail. Therefore, in light of the fact that Station WERX-FM must change its community of license in order to upgrade to Channel 273C1 because the Class C1 channel cannot be allotted to Edenton in compliance with the Commission's minimum distance separation requirements and there is a possibility that almost 1,300 people will receive a second fulltime aural service, we find that the public interest would be served by granting the petitioner's request.

CWA submits that the allotment system relies on theoretical proposals and theoretical outcomes. This may not be what MTS likes, but it is the policy of the Commission. If MTS wants the Commission to review the “realities” of allotment proceedings (including how one can serve a rural crossroads), there is a mechanism to do this. However, this proceeding is that the means for doing so.

As for MTS’s contention that the CWA Cambridge Proposal will result in the removal of local service from St. Michaels, in violation of Commission policy, it is equally meritless. As set forth by CWA in its Petition for Rulemaking, the CWA Cambridge Proposal fully complies with Commission policy with regard to the St. Michaels allotment. In connection with its FM allotment priorities, the Commission only prohibits the removal of a community’s sole operating local service on grounds that such a change presumptively disserves the public interest. *See Amendment of the Commission's Rules Regarding Modification of FM and TV Authorizations to Specify a New Community of License*, 4 FCC Rcd 4870 (1989), *recon. granted in part*, 5 FCC Rcd 7094, 7096 (1990). However, as the Commission itself has determined, removal of an unconstructed station from a community does not present the same concerns as the loss of service represented by the removal of an operating station. *See Sanibel and San Carlos Park, Florida*, 10 FCC Rcd 7215 (MMB 1995); *Pawley's Island and Atlantic Beach, South Carolina*, 8 FCC Rcd 8657 (MMB 1993); and *Glencoe and LeSueur, Minnesota*, 7 FCC Rcd 7651 (MMB 1992). In the case of an unbuilt Station, the community has not experienced local transmission service and or developed reliance thereon, therefore reallocation of an unbuilt station such as WINX cannot be construed as a loss, and the “no removal” rule need not be applied. *Id.*

As set forth in its Petition for Rulemaking, CWA has never modified its license to specify St. Michaels, or constructed a facility based on service to St. Michaels. Similarly, the

Commission has never changed the Station's community of license in its own database – the CDBS database evidences Cambridge, not St. Michaels, as the Station's community of license. Because no license has issued for the St. Michaels facility, and because that facility was never constructed, reallocation of the Station does not violate the Commission's "no removal" policy. MTS's suggestion that CWA's actions somehow render it ineligible for the unbuilt station exception is completely without basis. The history of CWA's actions vis-à-vis the Cambridge-St. Michaels allotments has always been, and remains, a matter of Commission record. That record clearly evidences CWA's complete candor with and disclosure to the Commission. Accordingly, MTS's claim is without merit, and the St. Michaels allotment should be treated as an unbuilt Station in conformance with standard Commission policy.

As further shown in the Petition for Rulemaking, the prohibition on removing a sole service should not apply here where CWA is proposing a return to the Station's original allotment under the FM Table of Allotments, rather than an amendment thereof. The change in the Station's community of license to St. Michaels was undertaken on the basis of a technical problem unrelated to the Commission's allotment priorities. The technical problem was disposed of long ago and with it the need to modify the Table of Allotments. Under the Station's current broadcast operations, St. Michaels does not, practically-speaking, receive first local transmission service from the Station. Instead, CWA has operated the Station in a manner consistent with the designation of Cambridge as its local community and the people of Cambridge, not St. Michaels, have come to rely on it. Accordingly, the public interest would be served by the return of the Station's community of license to Cambridge.³ The respective public

³ In fact, the Commission suggested that CWA seek such a result. *Cambridge and St. Michaels, Maryland*, 17 FCC Rcd 20425, 20426 (2002). See also *Cambridge and St. Michaels, Maryland*, 19 FCC Rcd 2592, 2593 (2004).

benefits of the Cambridge and St. Michaels allotments are such that the Media Bureau preferred the Cambridge allotment in creating the FM Table of Allotments. And, as set forth in the Petition for Rulemaking, and in the attached Engineering Statement, the upgrade of the Station to a Class B1 facility proposed by CWA would not diminish current service to St. Michaels. Instead, the proposed allotment change together with the proposed upgrade would result in a net service gain while improving the level of service to St. Michaels, and would thus better serve the public interest. In fact, the gains identified by in this proceeding by the Bureau and CWA, including the underserved areas contained therein, provide substantial support for CWA's Cambridge Proposal.

C. THE CHANNEL 235A PROPOSAL WOULD RESOLVE THIS PROCEEDING

The most surprising part of MTS's pleading is its effort to disparage the Newark allotment proposal that would provide MTS with the allotment relief that it sought in its Counterproposal. Despite this, MTS appears to argue that giving it what it seeks is not enough. CWA has never heard of a party that obtains the result it wants but finds every reason not to accept it.

Interestingly, MTS can find no technical reason that would prevent Channel 235A from being allotted to Newark. Rather, MTS takes upon itself the obligation of arguing for Route 12 Community Broadcasters ("Route 12"), the proponent of the Stockton Counterproposal that Stockton, too, should receive an allotment. Certainly, the Stockton proponent can respond for itself.

As for MTS's arguments in favor of a channel allotment, they are wide of the mark. Of principal importance is that MTS ignores the fatal engineering flaw that affects the Stockton

Counterproposal. As CWA showed in its Reply Comments filed on April 20, 2004, the Stockton Counterproposal must be rejected because⁴:

The proposed facility is just clear of the spacing requirements of the 1992 St. Michaels reference site, but is short spaced to the licensed WINX-FM (Class A) facility, the proposed WINX Class B facility and the reference point, and the proposed Chincoteague reference point. There is no location from which a Channel 232 Class A facility may cover the community of Stockton, Maryland, and be properly spaced to the currently licensed WINX-FM transmitter site. As WINX does not propose to change its transmitter location, the Stockton, Maryland proposal cannot be considered.

Owing to the short-spacing, the implementation of the Stockton Counterproposal would require CWA to relocate the transmitter site for WINX-FM. This is at odds with the Commission's policy that in connection with allotment proceedings, it refrains from "requiring a transmitter site change by an unwilling licensee or permittee." *Rockport, Texas et al.*, 4 FCC Rcd 8075, 8076 (MMB 1989). Recently, the Commission dismissed a Counterproposal on the basis that the Commission does not take an action in an allotment proceeding that would require the involuntary change in a Station's facilities. *Arlington, Oregon, et al.*, 19 FCC Rcd 12803, 12809 (2004). Such a result is required in this proceeding as well.

Even assuming that the Commission can mandate the involuntary modification of a licensee's facilities, MTS's arguments are without merit. Claiming that Stockton is entitled to treatment as a community for allotment purposes, MTS makes the bald assertion that Stockton "is a Census Designated Place with its own zip code, post office, volunteer fire department and local churches and businesses." MTS fails to note that CWA has raised serious questions as to whether Stockton, with a total CDP population of 143, has the panoply of institutions that MTS

⁴ See Engineering Statement of Cavell, Mertz & Davis, Inc., Exhibit D to Reply Comments, at p. 3.

alleges. MTS makes no effort to establish an evidentiary record in favor of Stockton's local institutions for, as CWA believes, no such record can be made.

MTS's other argument is that Route 12 would appeal any decision of the Bureau that results in an allotment for Newark without one for Stockton. This is pure speculation on MTS's part and deserves no consideration. If the staff of the Commission were to take actions based on possible appeals by a party, the Commission would be paralyzed. CWA submits that the staff should act and Route 12 will do as it sees fit and is permitted by principles of administrative and judicial review. CWA, for one, will do the same.

D. THERE IS NO NEED FOR REFERRAL TO THE COMMISSION

Recognizing the futility of its speculative claims, MTS presents one final argument intended to delay this proceeding. It urges the Media Bureau to refer this matter to the full Commission because it presents novel questions of law. As shown above, there are no novel questions of law or fact in this proceeding. Rather, the only problems with the well-settled law and facts are that they do not support MTS's conclusions. That is not a reason to delay staff action on CWA's Petition. On the contrary, this matter has been pending for over two years. It is time now for the Bureau take action on the extensive record before it.

E. CONCLUSION

For whatever its reasons, MTS wishes to prevent WINX from becoming a Class B1 station licensed to WCEM's community of license, Cambridge, Maryland. To that end, it has submitted a Counterproposal in this proceeding that would result in the country crossroads of Newark, Maryland receiving a new allotment in placed of an upgraded WINX. Following a practice long applied by the Commission, CWA has provided a showing, which MTS has been unable to find fault with, that WINX can be upgraded and Newark can receive a first

transmission service. Despite this, MTS continues to oppose CWA's Petition. While MTS is able to present its arguments, the record in this case is clear that CWA is entitled to its requested changes and, if the Commission finds that Newark is a community for allotment purposes, there is an alternative channel to allot there. As for the Stockton, Maryland Counterproposal it fails because it would require an involuntary change of WINX's facilities and Stockton is not a community for allotment purposes. Finally, as for the Chincoteague, Virginia rulemaking request, it is, by virtue of the other actions taken, not mutually exclusive with the allotments being made and should, as a result, be part of a separate rulemaking proceeding.

Respectfully submitted,

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January 28, 2005

CERTIFICATE OF SERVICE

I, Barry A. Friedman, do hereby certify that I have, on this 28th day of January, 2005,
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